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volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees." A group of objecting students sued the board in federal district court. The court upheld the policy, and the Eleventh Circuit held the case was mooted by the students' graduation. A new group of student objectors sued the district, and the court again upheld the policy. The U.S. Court of Appeals, Eleventh Circuit, initially reversed the decision, but a majority of the Eleventh Circuit later held the absence of state involvement in the student vote, the nomination of a student speaker, and the content of the speech insulated the policy from any finding of facial unconstitutionality.

The U.S. Supreme Court remanded the case to the Eleventh Circuit for reconsideration in view of *Santa Fe Independent School Dist. v. Doe*. The Eleventh Circuit reiterated its finding that **the policy divorced school officials from the decision-making process**. Control over this aspect of the graduation ceremony rested with students, and schools did not adopt or endorse private religious speech by failing to censor messages. The court refused to assume that seniors would interpret the failure to censor student messages as an endorsement of religion. It pointed to numerous factual distinctions between the Duval County case and the Texas school district policy at issue in *Santa Fe*. The Duval County policy referred only to graduation "messages," and it did not encourage prayers, affirmatively forbidding school officials from reviewing student messages. By contrast, the Santa Fe policy subjected student messages to regulation by the high school principal, and therefore, the state. **The Duval County policy did not preordain that a prayer would be delivered**, as the Supreme Court had found in *Santa Fe*. The court reinstated its decision for the county. *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001).

D. School Policies

1. The Pledge of Allegiance

Over 60 years ago, the U.S. Supreme Court held the states cannot compel citizens to recite the Pledge of Allegiance in *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943). The Court held the First Amendment protects both the right to speak freely and the right to refrain from speaking at all. The terrorist attacks of September 11, 2001 prompted many new laws and policies providing for the recitation of the Pledge in public schools.

◆ The non-custodial father of a California student sued state, local and federal officials in a federal district court, claiming a 1954 Act of Congress adding the words "under God" to the Pledge violated the Establishment Clause. He also claimed a state law requiring elementary schools to open the day with patriotic exercises and the school district's use of daily Pledge recitations violated the Constitution. The court dismissed the case, but the U.S. Court of Appeals, Ninth Circuit, held the father had standing to challenge a practice that interfered with his right to direct his daughter's religious education. It held the 1954 Act and district policy violated the Establishment Clause. The court denied a motion by the child's mother to intervene in the case, even though a state family court order granted her the child's exclusive legal custody. She alleged her daughter

was a Christian who did not object to recitation of the Pledge. The Ninth Circuit reconsidered the standing issue and noted the father no longer claimed to represent his daughter. It held he retained a state law right to expose her to his particular religious views, even if they contradicted those of the mother.

The U.S. Supreme Court granted the district's petition for review. It stated that domestic relations was an area in which the Court had customarily declined to intervene. The family court order was the controlling document at the time of the Ninth Circuit's standing decision. It gave the mother the final decision in the event the parents disagreed about the child's education. The Court rejected the father's claim to unrestricted rights to inculcate his daughter in his atheistic beliefs. His rights could not be viewed in isolation from the mother's parental rights. The father could not litigate the case as his daughter's next friend. Nothing done by the mother or the school board impaired his right to instruct the child in his religious views. **The Court held state law did not authorize the father to dictate what others could say or not say to his daughter about religion. It was improper for federal courts to accept a claim by a person whose standing was based on family law rights that were in dispute, when the lawsuit might adversely affect the person who was the very source of the claim to standing.** The Court reversed the judgment. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004).

◆ Florida Statutes Section 1003.44(1) required students to obtain their parents' written permission to be excused from reciting the Pledge of Allegiance. A school district patterned its policy after the law. Like the statute, the policy stated that "when a parent requests in writing, the student must be excused from reciting the pledge." It provided that each student had the right not to participate in daily Pledge recitations, but stated that "any student who is excused from reciting the pledge must still show full respect for the flag by standing at attention while the pledge is recited." A fourth-grade student was removed from class after he remained seated during a Pledge recitation. He sued the school and state and local education officials in a federal district court.

The court noted "a longstanding rule of constitutional law that a student may remain quietly seated during the pledge on grounds of personal or political belief." Many federal courts recognized the right of students to remain silent and seated during the Pledge, including the **Eleventh Circuit**. Parental rights to direct a child's education did not create a parental approval requirement for the exercise of a child's speech rights. The court held unconstitutional the parts of the state law requiring students to obtain a parent's excuse from reciting the Pledge and requiring students to stand during the Pledge. School officials could not require students to stand or obtain parental permission to be excused from reciting the Pledge. The board had to rescind its policy and was also ordered to pay the student \$32,500. *Frazier v. Alexandre*, 434 F.Supp.2d 1350 (S.D. Fla. 2006).

◆ Virginia law provides for the daily, voluntary recitation of the Pledge and placement of the U.S. flag in each public school classroom. Loudoun County Public Schools implemented the provision through a policy allowing students to remain seated quietly during Pledge recitation if their parents objected on

religious, philosophical or other grounds. An Anabaptist Mennonite parent asserted the Pledge indoctrinated his children with a "God and Country" religious worldview" and violated the Mennonite Confession of Faith. He sued the school system in a federal district court, asserting the inclusion of the words "under God" in the Pledge made it a religious exercise that violated the Establishment Clause. The Commonwealth of Virginia intervened in the case.

The court dismissed the action, finding recitation of the Pledge was a secular activity that neither advanced nor inhibited religion. The parent appealed to the U.S. Court of Appeals, Fourth Circuit. **The court stated that the Establishment Clause bars state and federal governments from aiding one religion, all religions, or preferring one religion, but does not require separation of church and state "in every and all aspects."** It rejected the parent's assertion that Pledge recitation amounted to a daily prayer. **The Supreme Court has indicated "fleeting references to God in the class-room [are] not unconstitutional."** The Pledge recognized only the fact that the founding fathers considered the nation to be one under God. Former Supreme Court Justice Sandra Day O'Connor characterized the words "under God" as an "acknowledgment of religion with the legitimate secular purposes of solemnizing public occasions, and expressing confidence in the future." The court held Pledge recitation was a patriotic exercise to foster national unity and pride. As the Pledge was a statement of loyalty to the U.S. and its flag, prayer cases were irrelevant. The court held the Establishment Clause "does not extend so far as to make unconstitutional the daily recitation of the Pledge in public school," and it affirmed the judgment for the school system and commonwealth. *Myers v. Loudoun County Public Schools*, 418 F.3d 395 (4th Cir. 2005).

◆ A few days before graduating, an Alabama student raised his fist and remained silent while the rest of his class recited the Pledge. He did this to protest the treatment of a classmate who had previously objected to reciting the Pledge. The principal told the student he could not receive a diploma unless he served three days of detention and apologized to the class. As there was not enough time left in the school year for the student to serve the detention and still receive a diploma, he accepted the alternative punishment of a paddling. The student sued the teacher, principal and school board in a federal district court, claiming First Amendment violations. He then added a claim based on a teacher's practice of beginning each school day by asking students for prayer requests and holding a moment of silence. The court held the teacher, principal and school board were all entitled to immunity, and the student appealed.

The U.S. Court of Appeals, Eleventh Circuit, noted that *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) established a clear right for students to refuse to say the Pledge. Any reasonable person would have known that disciplining the student for refusing to recite the Pledge violated his First Amendment rights. **School officials may reasonably restrict the time, place and manner of student expression, but cannot discriminate on the basis of viewpoint. Officials may only regulate student expression that materially and substantially interferes with school activities or discipline.** The court found the student was being punished for his unpatriotic views, not for being disruptive. As this violated his clearly established rights to free

expression and freedom from compelled speech, the officials were not entitled to immunity. **The school board was liable for violating the student's speech rights, as it had an official policy of requiring students to say the Pledge.** *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004).

◆ Pennsylvania Act 157 of 2002 required all public and private schools to display the U.S. flag in each classroom, and to conduct daily recitations of the Pledge of Allegiance or the National Anthem. Although students could opt out of daily recitations for personal or religious reasons, school officials had to report any such refusal to parents in writing. The law exempted religious and parochial schools from displaying the flag and conducting Pledge or Anthem recitations. No similar exception applied to nonreligious private schools. A federal district court held the parental notification requirement deterred public school students from their right to abstain from recitations. The law violated a fundamental liberty interest of parents to direct the education of their children and interfered with private school educational missions and association rights.

On appeal, the Third Circuit struck down **the parental notification requirement as viewpoint discrimination**. It was only triggered when a student exercised the right to refrain from a Pledge or Anthem recitation. This supported a finding that **the clause was drafted to deter students from opting out**. The court also held **the daily Pledge or Anthem recitations substantially burdened freedom of choice for private schools**. The notion that schools could overcome this burden through disclaimers did not erase the law's First Amendment infringement. The government interest in teaching patriotism could be satisfied in other ways besides rote recitation. The court held the law violated private school free association rights, and affirmed the judgment. *Circle School v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

◆ The U.S. Court of Appeals, Fifth Circuit, affirmed the dismissal of an action filed by a Texas parent who claimed several practices of a school district violated the Constitution. These included the Pledge of Allegiance, the use of certain symbols, and its observance of school holidays and celebrations. A federal district court properly dismissed the case because no reasonable observer would find the disputed phrases, symbols and actions indicated government approval of religion. *Mellen v. Congress of the U.S.*, 105 Fed.Appx. 566 (5th Cir. 2004).

2. Other Policies

◆ A New York school district released Catholic and Protestant students to nearby programs at designated times during the school day. Others remained in classrooms with nothing to do until released students returned. A family claimed the program led to "abusive religious invective directed against those who did not participate and that the district did not adequately train teachers and principals to protect non-participants from the taunts of program participants." The family sued the district in a federal district court, asserting the "released time" program violated the Establishment Clause by promoting Christianity over other religions and non-religion. The court held for the district, ruling it did

not implement the released-time provision of state Education Law Section 3210(2)(b) in a way that advanced Christianity over other religions and non-religion. The family appealed to the U.S. Court of Appeals, Second Circuit.

The court explained the released-time program authorized by New York Education Law Section 3210(2)(b) and state regulations permitted districts to release students, with parental permission, for one hour per week for religious instruction. The U.S. Supreme Court upheld this law in *Zorach v. Clauson*, 343 U.S. 306 (1952). The family insisted the district's implementation of the program violated the Establishment Clause by favoring Christianity over other religions and non-religion. The court disagreed, finding nothing in this case suggested a different result than *Zorach*. **The program used no public funds and involved no on-site religious instruction. Schools simply adjusted their schedules to accommodate student religious needs. The court rejected the argument that the school's imprimatur was placed on a program of religious instruction** and that churches used the schools in support of their religious missions. Nothing in this case suggested the released time program was administered in a coercive manner. Because the district implemented the law consistently with *Zorach*, the court affirmed the judgment. *Pierce v. Sullivan West Cent. School Dist.*, 379 F.3d 56 (2d Cir. 2004).

◆ A Michigan high school student council invited student organizations to help with panel discussions for its 2002 Diversity Week. The faculty advisor agreed to turn over a panel on sexual orientation to the Gay/Straight Alliance (GSA) and its two faculty co-sponsors, both of whom were openly gay teachers at the school. The GSA Club invited religious leaders to speak and expanded the panel discussion to "homosexuality and religion." The club arranged for six speakers, including a "very gay friendly" minister. A member of the "Pioneers for Christ" student club was denied permission to include clergy members with opposing viewpoints on the panel. An e-mail sent by the advisor acknowledged the Pioneer Club's legal right to be on the panel and recited the available options of canceling the panel or allowing the Club to speak. The principal rejected the student's request for her club to appear on the panel, because she failed to attend a "mandatory" student council meeting. The faculty advisor offered to let the student speak about "what diversity means to me." She accepted the offer, but changed her mind when the principal disapproved parts of her message. During the panel discussion, panelists stated biblical passages had been misconstrued by others to mean homosexuality was incompatible with Christianity.

The student and her mother sued the school district, principal and staff in a federal district court for violating her constitutional rights. The court explained that educators must remain neutral to the viewpoint of student speech in school-sponsored forums. **The decisions to restrict the student's speech and exclude her club from the panel were not viewpoint neutral. They were motivated by the school's disagreement with her message. The administrators suppressed the student's speech in violation of the First Amendment.** Their decision was made despite full knowledge of her club's speech rights, as the advisor's e-mail indicated. The school's stated reasons for excluding the student, particularly her absence from the "mandatory" meeting, were pretextual. **The administration violated the Establishment Clause by**

creating a panel with an overtly religious message. The panel was created to convey only a religious viewpoint that homosexuality is not condemned in the Bible. The court described this as "one-way diversity." The administration's actions discriminated against the student in violation of the Equal Protection Clause. The court denied immunity to the administrators, as they had violated the student's clearly established fundamental rights. *Hansen v. Ann Arbor Public Schools*, 293 F.Supp.2d 780 (E.D. Mich. 2003).

◆ Maryland law established a public school holiday from the Friday before Easter through the Monday after Easter. A Maryland teacher asserted the law violated the Establishment and Equal Protection Clauses of the U.S. Constitution because she was required to use personal leave or leave without pay to observe Jewish holidays. She filed a federal district court action against state education officials, seeking a declaration that the school holiday was unconstitutional. The court considered the parties' cross motions for summary judgment and observed that Easter is now highly secularized. The statutory vacation period surrounded Easter and did not mention Good Friday. The Monday after Easter has no religious significance. The school officials advanced a secular purpose for the statute. Many students and teachers would be absent on the Friday and Monday surrounding Easter, which might disrupt effective instruction and cause monetary outlays for substitute teachers.

The court held the law did not violate the Establishment or Equal Protection Clauses, and it granted summary judgment to the school officials. The teacher appealed to the U.S. Court of Appeals, Fourth Circuit, which stated **the law was not facially unconstitutional because it provided an annual holiday to all students and teachers, regardless of religious affiliation.** The law passed the *Lemon* test because it had the legitimate secular purpose of economizing scarce educational resources that would otherwise be wasted on days when many students and teachers would be absent. The holiday did not advance or endorse Christianity over other religions. Entanglement between the state and religion also did not occur. The district court decision was upheld. *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999).

3. Immunization

School districts and state educational agencies have a compelling state interest in requiring the immunization of all students in an effort to prevent and control communicable diseases.

◆ Arkansas Code Section 6-18-702(a) prevented schools from admitting students without certification of immunization for specified diseases. It made an exemption available to parents who objected to immunization on religious grounds if they were members of a "recognized church or religious denomination." Four Arkansas students filed separate federal district court actions against state and local officials, asserting Section 6-18-702(a) violated the Establishment Clause by limiting the exemption from immunization to those who objected on religious tenets and practices of a "recognized" church or denomination. In two cases, the students claimed they had sincere religious

beliefs even though they did not belong to a religion "recognized" by the state. The courts held the exemption violated the Establishment Clause, agreeing with the students that the exemption had a discriminatory impact on religious groups not officially recognized by the state. One of the decisions held state education department regulations improperly entangled the state with religion by requiring officials to inquire into the sincerity of student religious beliefs. Although the courts found the exclusion unconstitutional, it was severable from the rest of the immunization law. As a result, the students still had to be immunized. *McCarthy v. Boozeman*, 212 F.Supp.2d 934 (W.D. Ark. 2002), and *Boone v. Boozeman*, 217 F.Supp.2d 938 (E.D. Ark. 2002).

The students appealed to the Eighth Circuit, which observed the Arkansas legislature had by then amended Section 6-18-702 to omit the references to "recognized religions." The exemption was now available to any student whose family had religious or philosophical objections to immunization. The state health department passed regulations implementing the law. The court observed that none of the students were denied the benefit of the new exemption under the amended law or regulations. **The legislative amendment made the exemption to immunity available to each of the students. As the legislature had provided them even greater relief than they sought by bringing the litigation, the case was now moot.** The court rejected the students' speculative arguments that the legislature might repeal the new legislation or that the amendment discriminated against religious objectors. The legislature had acted to protect students and other citizens, and the health department had acted quickly to pass new regulations. The state had powers to exclude nonimmunized students from school during an outbreak or other emergency. Neither the amended law nor the regulations allowed officials to assess the merits of a student's religious beliefs. As the case was now moot, the court dismissed it. *McCarthy v. Ozark School Dist.*, 359 F.3d 1029 (8th Cir. 2004).

◆ Members of "the Congregation of Universal Wisdom" objected to the introduction of any foreign material into the body on religious grounds. A New York student and her mother, who were members of the congregation, notified their school district of their religious objection to New York Public Health Law Section 2164, which requires immunization before admission to public school. The district determined the congregation was not a genuine religion and denied the mother's objection. The district found her objection was based on personal philosophy, not a legitimate religion. The school board denied the mother's appeal, and she sued the board and district in a federal district court, alleging violation of the Constitution and Section 2164. The court allowed the student to attend school pending consideration of the case. While it found her religious affiliation "questionable," the court said she was likely to prevail on the merits of the case because her objection was apparently based on religion, not philosophical or scientific reasons. The board moved to dismiss the case.

The court observed Section 2164 exempts children from the immunization requirement if their parents hold genuine and sincere religious beliefs that are contrary to immunization. The court applied the three-part Establishment Clause analysis from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It found the exemption was sufficiently neutral to satisfy the secular purpose test, because it did not

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